

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,)
)
 Plaintiff,) 8:08CR409
)
 v.)
)
OLGA ECHERIVEL,) MEMORANDUM OPINION
)
 Defendant.)
)

This matter is before the Court on defendant's motion under 28 U.S.C. § 2255 to vacate, set aside, or correct sentence by a person in federal custody (Filing No. [124](#)), requesting her sentence be vacated and to remand the matter for resentencing, and the government's response to that motion (Filing No. [126](#)). The defendant sets forth three grounds as the basis for her motion. Ground 1 states that the district court erred when it gave the jury, which was deadlocked, supplemental instructions. Ground 2 alleges ineffective assistance of counsel, and Ground 3 alleges that counsel was deficient in the fact that defendant was not afforded an interpreter.

Trial of this case commenced on October 26, 2009, on the superseding indictment upon which defendant was arraigned on the morning of the commencement of the trial. The jury found the defendant guilty of the crime charged in Count I of the superseding indictment. The defendant appealed her conviction,

and the United States Court of Appeals for the Eighth Circuit affirmed her conviction on October 18, 2010.

Addressing Ground 1, the Court notes that this issue was raised by the defendant on her appeal to the United States Court of Appeals for the Eighth Circuit. The Court of Appeals, citing *United States v. Ybarra*, 580 F.3d 735, 738 (8th Cir. 2009), and *United States v. Walrath*, 324 F.3d 966, 97 (8th Cir. 2003), affirmed defendant's conviction and sentence, noting that the instruction given was in accord with the prior opinions of the Court of Appeals, and there was no evidence in the record to support the finding that the jury was coerced by that instruction.

In Ground 2 defendant alleges she received ineffective assistance of counsel. With respect to effective assistance of counsel as required by the Sixth and Fourteenth Amendments to the Constitution, the seminal case is *Strickland v. Washington*, 466 U.S. 668 (1984), wherein the Supreme Court laid down the following guidelines in addressing this issue:

Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court

must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

* * *

An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. *Cf. United States v. Morrison*, 449 U.S. 361, 364-365, 66 L.Ed. 2d 564, 202 S.Ct. 665 (1981). The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.

* * *

The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

* * *

In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury.

Strickland v. Washington, 466 U.S. at 690-695.

These rather lengthy quotes from *Strickland* define the "arena" within which the Court will address petitioner's claims of effective assistance of counsel.

Considering the matters raised by the defendant, the Court finds that her allegations fail to rise to ineffective assistance of counsel.

In Ground 3 defendant claims that her counsel was deficient in the fact that she was not afforded an interpreter. Her allegation reads as follows:

Counsel was deficient in the fact that I was not afforded an interpreter. I am of Mexican (Spanish) decent (sic). I was unable to fully understand the proceedings, either the legal terminology, or the English version. My counsel stated I didn't need an interpreter, but I did.

The transcript of the trial which commenced at 9 o'clock a.m. on October 26, 2009, reveals that the first act

which the Court took was to administer an oath to an official interpreter.

THE COURT: Do you solemnly swear that you will justly, fairly, truly and impartially act as an interpreter in the case now before the Court, so help you God?

INTERPRETER [BERTA] BIRITOS: Yes.

In addition, the Court's official interpreter, Laura Garcia-Hein, participated as an interpreter during the trial of the case. The record further reflects the following discussion between the Court and the defendant:

THE COURT: All right. But are you satisfied that you understand the interpreters that we have here today who will act as interpreters during the course of this trial?

THE DEFENDANT: Yes, Your Honor.

This claim is without merit.

Having considered all of the claims of the defendant, the Court finds her motion is without merit and should be denied. The Court further finds that no certificate of appealability should issue in this case. A separate order will be entered in accordance with this memorandum opinion.

DATED this 29th day of August, 2011.

BY THE COURT:

/s/ Lyle E. Strom

LYLE E. STROM, Senior Judge
United States District Court